

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Orig. Appellant's motion

77-1190

To be argued by
CHERYL M. SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1190

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH MARIANI,

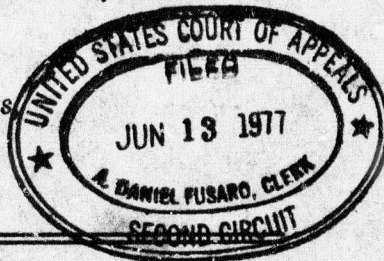
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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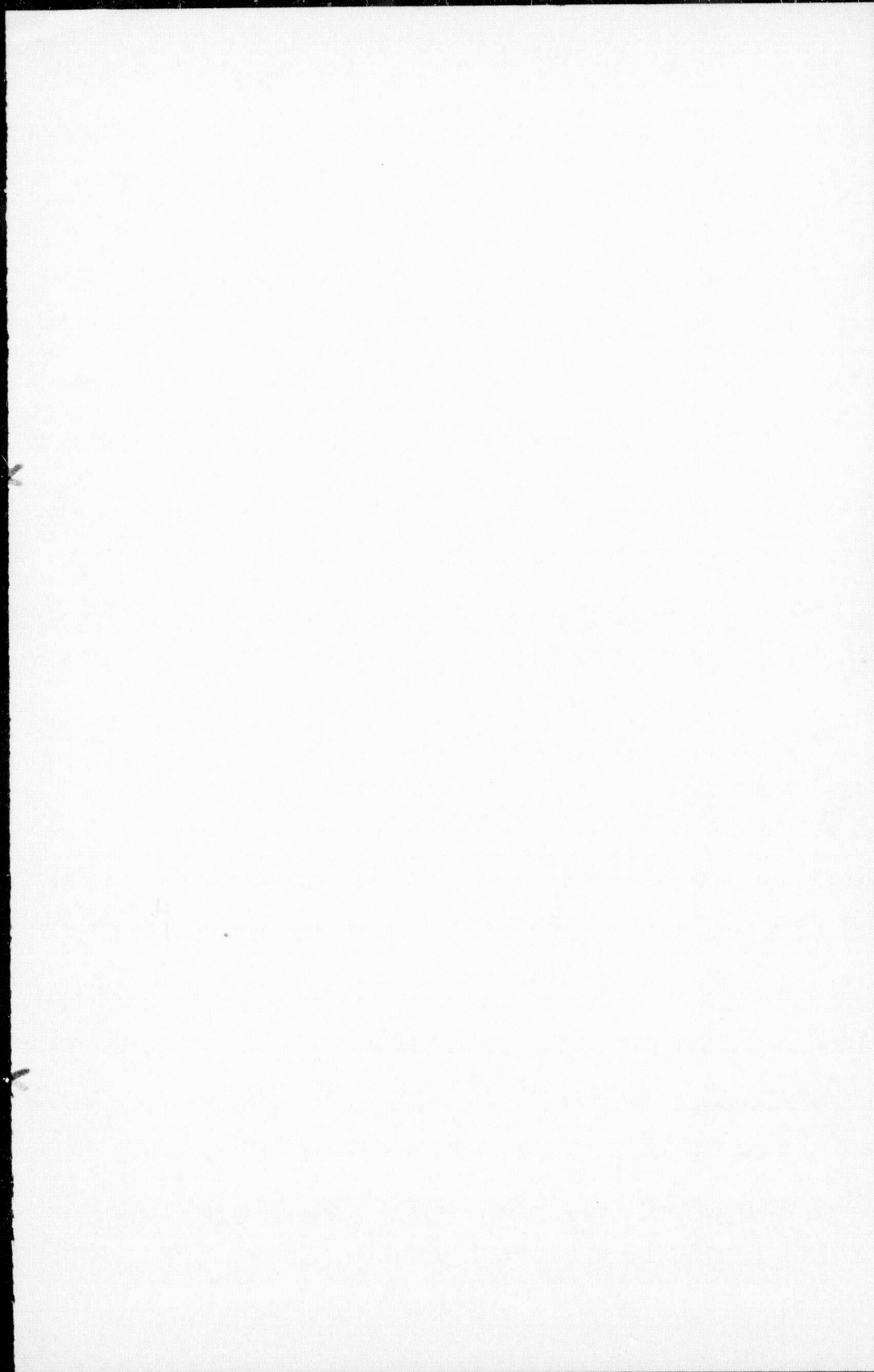


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1190

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH MARIANI,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Ralph Mariani appeals from the findings and opinion of the United States District Court for the Eastern District of New York (Platt, J.), filed on November 10, 1976, pursuant to a mandate of the Court of Appeals for the Second Circuit¹ remanding the case for an evidentiary hearing on the legality of the search of appellant's car and the consequent seizure of bullets found therein. Appellant also asks the Court to decide an issue not reached in his first appeal, from the underlying judgment of the United States District Court for the Eastern District of New York, entered on December 12, 1975, convicting him, following a jury trial, of aiding and abetting bank robbery by force, violence and intimidation (Count I) and of aiding and abetting armed bank robbery (Count II), in violation of Title 18, United States Code, §§ 2113(a) and (d) and § 2.

¹ *United States v. Mariani*, 539 F.2d 915 (2d Cir. 1976).

Appellant was sentenced to serve eight years imprisonment. He is presently serving this sentence.

Appellant claims on appeal that the district court's finding, after an evidentiary hearing, that he voluntarily consented to the search of the automobile in which the bullets were found, is clearly erroneous. He also asks the Court, in the event it affirms this finding of the district court, to reconsider his claim as to abuse of discretion in denying a severance, which he raised in his original appeal but which was not reached by this Court.

Statement of Facts

A. Introduction

Initially, appellant appealed from his conviction of armed bank robbery after a jury trial in the United States District Court for the Eastern District of New York (Platt, J.). Two of his claims on appeal, insufficiency of the evidence and inadmissibility of a prior conviction, were rejected by the Court. In discussing appellant's third claim, allegedly improper impeachment through the use of illegally seized evidence, the Court noted that the record was insufficient to determine whether or not the evidence was legally seized but assumed for the purposes of the decision that the search and seizure were unlawful. *United States v. Mariani*, 539 F.2d 915, 922-923 (2d Cir. 1976). Appellant's conviction was therefore reversed, and the case was remanded for a new trial. Appellant's fourth claim, abuse of discretion in denying a severance, was not reached by the Court.

The Government then petitioned for rehearing and also asked that the mandate be amended to only require

a hearing on the legality of the search of appellant's car rather than a new trial. By order dated August 16, 1976, and issued on September 17, 1976, the Court denied the petition for rehearing but granted the Government's motion to amend the mandate, and a hearing was held before Judge Platt on October 21, 1976.

B. The Hearing

1. The Government's Case

At approximately 11:30 or 11:45 P.M. on the night of August 25, 1975, Special Agent Henry Garcia, Federal Bureau of Investigation, was "staked out" on appellant's car a few blocks from appellant's apartment in Brooklyn (3-4).² Other agents were posted in the vicinity. They were waiting to arrest appellant in the event he should appear (4, 18). Shortly before midnight, Agent Cronin notified Agent Garcia over the radio that he had arrested the appellant at his apartment (4). Agent Garcia proceeded directly to the apartment, arriving there at 11:50 P.M., about five minutes after appellant had been placed under arrest (4, 6). Agent Cronin, appellant and two New York City Police Department detectives were in the living room of the apartment when Garcia arrived (6).³

Before Agent Garcia's arrival, Agent Cronin had given appellant his *Miranda* warnings in English and had told appellant that he was being arrested in con-

² Numbers in parentheses refer to pages of the hearing transcript.

³ Appellant had been arrested while showering but by the time Garcia arrived, a few minutes later, he was fully dressed (19-20).

nection with the bank robbery that had occurred earlier in the day at the Chemical Bank on Cortelyou Road (6-7). Agent Garcia repeated all of this to appellant in Spanish (6-7).⁴

Agent Garcia told appellant that they wanted to search his car, and appellant said he would give permission to do so. Agent Garcia told appellant that he could refuse, but appellant consented nevertheless. Garcia next told appellant that the permission would have to be in writing, and appellant then stated that there were a gun and ammunition in the car. (8)

After ascertaining that appellant could read and write English, Garcia wrote out the permission in English and then read it to appellant, showing him the statement so he could read along. Garcia then asked if appellant was willing to sign the consent, and appellant then did sign it in front of Garcia. (9-11) ⁵

Agent Garcia asked appellant only once for his consent to search. Only three to five minutes passed from the time he first asked for the permission until appellant actually signed the consent. During this time, a New York City Police detective was sitting next to Garcia, but no one other than Garcia spoke to appellant. (11). Agent Cronin and two detectives, one of whom carried a shotgun, were not in the immediate area. All handguns were holstered. (20)

⁴ Appellant does not challenge the voluntariness of the consent on the basis of a language barrier.

⁵ The consent signed by appellant provided: "I, Ralph Mariani, have been advised of my rights and understand my rights. I voluntarily permit the Federal Bureau of Investigation to search my automobile. No threats or promises have been made to me to grant this permission." (11).

After the consent was signed, appellant gave his car keys to Garcia, who then passed them to another agent to be used in searching the car. (14)

Agent Garcia had learned from appellant that he had called the Federal Bureau of Investigation and had intended to turn himself in but was arrested before he could do so. (13-14)

Subsequently, Agent Garcia developed background information about appellant. Mariani told him that he was twenty-nine years old, had received eleven years of schooling in Brooklyn and New York, could read and write English, and had eleven prior arrests. (15-17) ⁶

2. The Defense Case

Appellant took the stand on his own behalf. He testified that he had spoken to his wife on the evening of August 25, 1975, and that she told him that agents were looking for him. He then returned to his apartment, "called Mr. Cronin" to tell him he was going to turn himself in,⁷ and then got into the shower. Almost immediately, according to appellant, two agents burst into the apartment, guns drawn, and told him to get out of the shower. He was handcuffed and brought to the living room, where he was left standing, dripping water and soap. The agents "started walking all over the house," and they were soon joined by three more agents. The handcuffs were removed from appellant, and he

⁶ The district court took note, with appellant's consent, of the trial testimony in which appellant had admitted to two prior convictions (17).

⁷ Appellant must have talked with an agent other than Cronin since Cronin placed him under arrest within minutes after the phone call.

was allowed to dress. An agent then advised him of his rights and asked him to sign a paper, as he understood it, to prove that he had been advised of his rights. (27-28)

Appellant stated that he did not understand what he was signing because he was scared by the fact that four agents were present, with guns pointed down. He explained that he had thought he was going to be killed when the agents first entered the apartment. Even though he had been arrested eleven times before, he claimed that it had never been in such frightening circumstances. In addition, although he did not claim that he had been physically coerced into signing the advice of rights form, he testified that "they said something about my wife getting involved", and he noticed agents looking in the drawers and closets. According to appellant, an agent then asked him if he owned a car, and he gave the agent the keys. All of the above occurred before Agent Garcia arrived. (29-30)

After Agent Garcia arrived, he asked appellant to sign what appellant understood to be a second advice of rights form, but what in fact was the consent to search. Appellant said that he did not read this form before signing it, nor had he read the first form he signed. The first form he signed was big and the second was small, but appellant thought they were the same thing. (33-34)

Appellant further testified, on cross-examination, that he had been arrested eleven times before and had been given his *Miranda* warnings each time. Upon being questioned by the Court, appellant indicated that he knew these rights included the right to an attorney and the right to remain silent, and he understood that if he said anything, it could be used against him. He further testi-

fied that he had had a lawyer appointed to represent him after each of the eleven arrests and had consulted with the lawyers about his cases. (35-36) Appellant stated that when he had signed the consent form, thinking it was an advice of rights form, all he was thinking of "was the guy with the gun, my wife, what a mess I got into." ⁸ At headquarters, later that evening, he signed a statement about what he and his co-defendant had done that day, but he said he did not read that document either. (37-38)

C. The Court's Findings

In a written opinion, reproduced as the Government's Appendix, the court found that appellant's testimony could not be credited (A. 5a).⁹ The court found that appellant was aware of his constitutional rights when he called the Federal Bureau of Investigation to turn himself in (A. 5a) and at the time the agents arrived at his apartment to arrest him (A. 1a). The court pointed to the facts of appellant's eleven prior arrests and his having been advised of his rights on those occasions (A. 5a-6a) in support of this finding.

The court further stated that, in view of appellant's testimony that he had signed an advice of rights form, his further contention that Garcia hand wrote a second form, misrepresented its contents and asked appellant to sign it was "to put it bluntly, incredible". The court discredited appellant's claim that he had been coerced

⁸ Agent Garcia, who arrived within 5 minutes of appellant's arrest, testified that no threats against Mariani's wife were made in his presence (21) and that Mariani seemed to be in control of the situation and did not appear nervous (23).

⁹ Numbers preceded by "A" refer to pages of the Government's Appendix.

into signing the consent by threats against his wife and the presence of drawn guns. The court, earlier in its opinion, had pointed to examples of self-contradictory testimony of appellant on these issues. The court found that to the extent the appellant testified that force or threats were used to obtain his consent to search his car or to obtain his keys, "his testimony was not believable or believed". (A. 4a-A. 7a) On the other hand, the court found that Agent Garcia's testimony on these points should be fully credited. Based on Garcia's testimony, the court found that appellant had voluntarily called the Federal Bureau of Investigation, had been advised of his rights and had signed a "rights form" before Garcia arrived. The court further found that the verbal and written permission to search appellant's car had been given in substantially the manner Garcia described. The court also wrote that there was nothing in Garcia's testimony to suggest that "any force or threats of any kind were used by the agents to obtain both a verbal and written permission from the defendant." (A. 6a-A. 7a) Finally, the court found that in the totality of the circumstances and from the credible evidence, appellant's consent was voluntarily given. (A. 7a)

A R G U M E N T

POINT I

**The Consent To Search Appellant's Automobile
Was Voluntarily Given.**

Appellant argues that the district court's finding that his consent to search his automobile was "completely free, unrestrained and voluntary" was clearly erroneous in view of the totality of the circumstances of the consent.¹⁰ Specifically, appellant alleges that the court failed to take into account his testimony that his consent was the product of coercion and threats against his wife and that the Government failed to meet its burden of proof as to these claims. Appellant further claims that his testimony established five factors which require a finding of involuntary consent: (1) a needlessly abusive arrest, (2) the number of armed officers in his home, (3) the effect of an officer holding a shotgun, (4) a warrantless search of his closets and drawers, and (5) a direct threat made against his wife.¹¹

¹⁰ Appellant and the Government agree that the Government has the burden of establishing that the consent was voluntary, *Bumpers v. North Carolina*, 391 U.S. 543 (1968), and that the consent must be assessed in "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The appellant and Government further agree that the district court's finding will not be reversed on appeal unless clearly erroneous. *United States v. Weiner*, 534 F.2d 15 (2d Cir. 1976); *United States v. Griffin*, 530 F.2d 739 (7th Cir. 1976).

¹¹ The proof adduced at the hearing established that appellant was arrested in the shower but was immediately allowed to dress, and his handcuffs were quickly removed (28). Although at one point five agents were in the apartment, all handguns were holstered, and the officer with the shotgun was not near appellant. Only two agents, Garcia and a police detective, were with appel-

[Footnote continued on following page]

The Supreme Court, in *Schneckloth v. Bustamante*, 412 U.S. 218 (1973), set out several factors to be considered in the determination of whether a person's will has been overborne and his consent given involuntarily; these include age of the accused, level of education, level of intelligence, receipt of advice of constitutional rights, length of detention, length and nature of interrogation, and the use or absence of fraud, deceit, force or abuse by the agents, *id.* at 226, 248-249. In *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820 (1976), the Supreme Court also considered the defendant's previous experience with the law and the degree to which he facilitated the search.

The district court, in reviewing the testimony, properly took into account these factors: The court noted that appellant was thirty years old at the time of the search, had received eleven years of schooling in New York City, could read and write English, had eleven prior arrests and had been given *Miranda* warnings on each of those occasions. The court also noted that appellant had been informed of the charge against him and had been advised of his rights in both English and Spanish before being asked for his consent. Further, the court found that although appellant had been told he could refuse to consent, he nevertheless gave verbal and written permission. The court also noted that only one agent, who

lant when his consent was requested. (20). To the extent that any search of closets and drawers was done, of course, the Government contends that the agents have the right to search any area within the immediate control of appellant and to look for concealed persons who may present a danger. *Chimel v. California*, 395 U.S. 752 (1969). Moreover, the agents had to look in closets and drawers to get appellant's clothes for him. Cf. *United States v. DiStefano*, Dkt. No. 76-1581, Slip op. 3539, 3550 (2d Cir., May 16, 1977). Finally, the Government contends that no threat was made against appellant's wife.

arrived five minutes after learning that appellant had been arrested, talked with appellant at the time of the consent, that it took only three to five minutes to obtain verbal and written permission and that thereafter appellant turned over his car keys. In addition, the court determined that appellant had indicated a desire to turn himself in, that all guns except the shotgun, which was not nearby appellant and which was pointed down, were holstered and that no threats against appellant's wife were made in the presence of the agent who testified.

The district court, in concluding that appellant knowingly and voluntarily consented to the search of his car, discredited appellant's testimony concerning the threats against his wife¹² and presence of drawn guns, and fully credited Agent Garcia's testimony as to the circumstances surrounding the granting of permission to search the car. Simply phrased, the judge's conclusion

¹² Appellant relies on *United States v. Bolin*, 514 F.2d 554 (7th Cir. 1975), in support of his contention that a consent given in response to a threat to "involve his wife" is involuntary. Apart from the fact that the district court totally discredited his testimony on that issue, the Government contends that *Bolin* is factually distinguishable. In *Bolin*, the implied threat to arrest the defendant's girl friend was uncontested, unlike here. Moreover, the *Bolin* court found objective evidence to conclude that the defendant believed those threats from the facts that his girl friend was at his home where he knew the drugs were, the police had told him that they wanted to search his home for drugs, and the police had given the impression that they would have grounds for arrest for possession of drugs. Crediting, *arguendo*, appellant's testimony in the case at bar, no reasonable person with appellant's extensive prior experience with the law, would believe the vague threat to "involve" his wife, when she was not present at the time of the threat, when he had earlier talked with his wife and heard no complaints from her about her treatment by the agents, and when he had no reason to believe that his wife could be charged with any crime.

was based on his finding that he believed the testimony of Agent Garcia and disbelieved the testimony of Mariani. "The resolution of such an issue of credibility of course is the classic function of the trier of the facts", and will not be set aside unless clearly erroneous. *United States v. Weiner*, 534 F.2d 15, 17 (2d Cir. 1976). See also, *United States v. Medico*, Dkt. No. 76-1426, Slip op., 3795 (2d Cir., May 25, 1977).

Indeed, testimony quoted by the court, amply demonstrates that the court was justified in discrediting appellant's testimony. For instance, the court pointed to appellant's explanation of his state of mind at the time of the consent:

Q. [defense counsel] Did any of those law enforcement officials say anything to you about what would happen to you if you did not give them permission to get the car?

A. [appellant] No Sir.

And then again

Q. [defense counsel] Did any of the law enforcement officials that were there that night in your apartment, did they say anything to you what would happen to you? What would happen to your wife if you didn't give them the keys to the car?

A. [appellant] No.

And later

Q. [defense counsel] Tell us why did you give them the keys to the car.

A. [appellant] First of all I didn't want my wife to get involved. I just figured I had no car, you know.

THE COURT: You didn't have a car?

THE WITNESS [appellant]: I had a car, but I had nothing to hide in my car. They said, "can I get the key", so I gave them the keys. (A. 4a-5a)

The court further stated:

The Court also cannot believe defendant's present claim that the agents compelled him to sign the statement by threats with respect to his wife and by guns drawn during the proceedings. Again, the Court fully credits Special Agent Garcia's statements to the contrary and his express averment that "the handguns were all holstered".

There is nothing to suggest from the credible testimony given by Special Agent Garcia that any force or threats of any kind were used by the agents to obtain both verbal and written permission from the defendant to search his car or to obtain the keys from him for such purpose. To the extent that the defendant testified to the contrary, his testimony was not believable or believed. (A. 6a-7a).

Based on the above excerpts from the district court's opinion, it is clear that appellant's claim to the effect that the court failed to address the issue of coercion and disregarded his testimony (Appellant's Brief, p. 18) is unsupported by the record. Clearly, the court was familiar with appellant's testimony and, far from disregarding or overlooking it, characterized it as "incredible."

Moreover, the court's findings simply rejected appellant's version of the facts as to what happened in the five minutes before Agent Garcia arrived and impliedly found from the circumstantial evidence given by Garcia about what occurred in his presence and about what were appellant's state of mind and behavior during the time Garcia was present, as well as appellant's predisposition

to cooperate with the authorities,¹³ that appellant had not been the target of coercion or abusive practices by the agents before Garcia arrived.

Accordingly, we submit that the Government more than adequately met its burden of proof and established that, in the totality of the circumstances, appellant's consent was voluntary. Thus, the court's findings were proper.

POINT II

Appellant's Motion For A Severance Was Properly Denied.

The Government agrees with appellant that in the event the district court's findings and opinion is affirmed, his claim regarding the denial of his motion for a severance is still open. The Government, like appellant, relies herein on its argument set forth at pages 9-12 of its brief on the first appeal, Docket No. 76-1075, in which we argue that the denial of the motion was correct.

¹³ The court stated:

... the court fully credits the testimony of Special Agent Garcia and finds that *after voluntarily summoning the agents to his apartment* and being advised of his rights and signing a "rights form", the defendant was asked for permission to search his car and was advised that he had the right to refuse such permission. (A. 6a) (emphasis added).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
June 8, 1977

Respectfully submitted,

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APPENDIX

Findings and Opinion of Platt, D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
75 Cr. 757

UNITED STATES OF AMERICA,

—against—

RALPH MARIANI,

Defendant.

November 10, 1976

PLATT, D.J.

Following a judgment of conviction of aiding and abetting a bank robbery by force, violence or intimidation (Count 1) and aiding and abetting an armed bank robbery (Count 2), in violation of 18 U.S.C. §§ 2113(a), (d) and 2, entered in this Court after a jury trial, defendant appealed arguing, *inter alia*, that it was reversible error for the Court to have allowed the government to impeach his credibility as a witness with bullets "unlawfully" seized from his car, and the Court of Appeals for this Circuit reversed and remanded the case for a hearing to determine whether the search and seizure of the bullets in defendant's car was voluntary or involuntary (539 F.2d 915, 2d Cir., 1976).

Accordingly, on October 21, 1976, this Court held a hearing with respect to this particular issue.

At the hearing the government called Mr. Henry Garcia, a special agent of the FBI, who testified that between 11:30 and 11:45 on the night of August 25, 1975,

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he was "staked out in a car, the car belonging to Ralph Mariani, waiting to see if Mr. Mariani would come to his car" at which time he received a message from his co-special agent, Matthew J. Cronin, that he had arrested the defendant at defendant's apartment. On receipt of such message Mr. Garcia proceeded to the defendant's apartment and arrived there approximately five minutes after receiving the message (Tr. p. 4).

On his arrival, Mr. Garcia identified himself to the defendant, advised him of his rights orally in the Spanish language, and explained to him that he was being arrested in connection with the bank robbery that had occurred on that day at the Chemical Bank. The defendant then "indicated that Cronin had advised him of that". Agent Cronin had also advised the defendant of his Miranda rights (Tr. pp. 6-7).

Thereafter, Mr. Garcia indicated to the defendant that "we wanted to search his car. He stated he would grant us his permission. I indicated that I would have to obtain a written permission from him, and he indicated that we would find a gun and some ammunition in the car." And "I advised him that he had the right to refuse permission for the search of his car" but he said "that he would be willing to furnish us with permission for the consent to search his car" (Tr. p. 8).

Mr. Garcia then obtained a piece of paper from Mr. Cronin, wrote out the permission, read it to the defendant, showed him the statement that he had written out so that he could read it as it was being read to him and "asked him if he would be willing to sign it, and he did" (Tr. p. 9).

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The statement (Exhibit 2) reads as follows:

"I, Ralph Mariani, have been advised of my rights and I understand my rights. I voluntarily permit the FBI to search my automobile. No threats or promises have been made to me to grant this permission."

and Mr. Garcia testified that he personally saw the defendant sign this statement.

Special Agent Garcia further testified that this whole process of obtaining oral and written permission from Mr. Mariani to search his car took "approximately 3 to 5 minutes" and that he was the only one who was questioning the defendant or was talking to him during the time that such permission was obtained (Tr. p. 11).

After signing the written statement Mr. Mariani gave Special Agent Garcia the keys to his car who turned them over to another agent to be used for the search of the car.

In addition, Agent Garcia recalled that Mr. Mariani indicated a desire to turn himself in, and also testified that he questioned Mr. Mariani concerning his education and prior criminal record. Mr. Mariani responded that he had eleven years of education, could read and write English, and had a prior arrest (Tr. pp. 12, 15).

On cross-examination, Agent Garcia testified that although the agents and police officers were armed, all of the guns were holstered. He also said that no threats were made against Mr. Mariani's wife while he was present (Tr. p. 21).

The defendant took the stand and testified that when his wife advised him that there were agents looking for

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him, he called the FBI and advised them that he would be in his apartment. He further stated that he was in the shower when the agents broke into the apartment with guns drawn; "they pulled me out nude and they handcuffed me, my hands behind my back and they took me to the living room" (Tr. pp. 27-28). Then, according to the defendant, one of the agents "advised me of my rights. He said, 'this is your right, sign here' ". The defendant maintained that he did not know what he was signing when he signed this first statement and that the reason why he signed it was because "they said something about my wife getting involved." Thereafter the defendant admitted that no one "beat him to sign it", and that he also signed a second statement (Tr. pp. 29-30). He was asked this question by his counsel on direct and gave the following contradictory answers:

Q. Did any of those law enforcement officials say anything to you about what would happen to you if you did not give them permission to get the car? A. No Sir."

And then again

Q. Did any of the law enforcement officials that were there that night in your apartment, did they say anything to you what would happen to you? What would happen to your wife if you didn't give them the keys to the car? A. No.

And later

Q. Tell us why did you give them the keys to the car. A. First of all I didn't want my wife to get involved. I just figured I had no car, you know.

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THE COURT: You didn't have a car?

THE WITNESS: I had a car, but I had nothing to hide in my car. They said, "can I get the key", so I gave them the key.

The defendant then denied that any agent had told him that he did not have to give them the keys to the car and claimed that he signed the written statement (Exhibit 2) without reading the same because he "was scared" (Tr. pp. 30-31). He further claimed that the second statement was "just to prove that they advised me of my rights", although in a later response to a question from the Court, the defendant expressed doubt as to his knowledge of his rights (Tr. pp. 33, 35).

On cross-examination defendant admitted that he was 30 years old at the time; that he had 11 years of schooling in the New York public school system; that he had been arrested approximately 11 times before this arrest and that he had been given his Miranda warnings "every time I get arrested" (Tr. pp. 34-36).

The defendant also admitted that he remembered signing a statement at FBI headquarters about what he had done on August 25th with his co-defendant, Felix Acevedo. But again claimed that he had not read the statement before he signed it (Tr. p. 38).

As indicated at the conclusion of the hearing, the Court found it difficult to and did not credit the defendant's testimony. The defendant unquestionably was aware of his constitutional rights on the evening of August 25th when he advised the FBI agents of his whereabouts and, of course, at the time when they arrived at his apartment; he having been arrested on some 11 previous

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occasions and having been advised of such rights on each of such occasions. Moreover, he admitted that he had signed one "rights form" at the request of the agents before Special Agent Garcia arrived on the premises. His testimony to the effect that Mr. Garcia wrote out a second rights form, misrepresented what it was and had him sign the same is, to put it bluntly, incredible.

To the contrary, the Court fully credits the testimony of Special Agent Garcia and finds that after voluntarily summoning the agents to his apartment and being advised of his constitutional rights and signing a "rights form", the defendant was asked by Special Agent Garcia for permission to search his car and was advised that he had the right to refuse such permission. In response, defendant verbally gave such permission and indicated that he would be willing to give written permission therefor. Special Agent Garcia then wrote out the permission (Exhibit 2) and showed it to him as he read it to him and asked him if he would be willing to sign it. Thereafter, the defendant signed the statement.

The Court also cannot believe defendant's present claim that the agents compelled him to sign the statement by threats with respect to his wife and by guns drawn during the proceedings. Again, the Court fully credits Special Agent Garcia's statements to the contrary and his express averment that "the hand guns were all holstered".

There is nothing to suggest from the credible testimony given by Special Agent Garcia that any force or threats of any kind were used by the agents to obtain both verbal and written permission from the defendant to search his car or to obtain the keys from him for such

Appendix—Findings and Opinion of Platt, D.J.

purpose. To the extent that the defendant testified to the contrary, his testimony was not believable or believed. In the Court's opinion, given the "totality of the circumstances" presented and from the credible evidence, the defendant's consent was completely free, unrestrained and voluntary. *Schneckloth v. Bustamente*, 412 U.S. 218 (1973). There was no illegal search and seizure and the bullets thereafter found in the defendant's car were properly admissible in the government's direct case or for impeachment purposes on the cross-examination of the defendant.

The foregoing represents the findings and opinion of the Court on the hearing mandated by the Court of Appeals for the Second Circuit.

THOMAS C. PLATT
U.S.D.J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK

COUNTY OF KINGS

EASTERN DISTRICT OF NEW YORK

} ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of June 19 77 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

STEPHEN FLAMHAFT, ESQ. 32 COURT STREET, BROOKLYN, NEW YORK 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Brooklyn Borough~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

13th day of June 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979